United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. Affidavit of mailing

77-1017
77-2055

To be argued by
LEE A. ADLERSTEIN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1017, 77-2055

UNITED STATES OF AMERICA,

Appellee,

—against—

PHILIP FLOYD TOLLIVER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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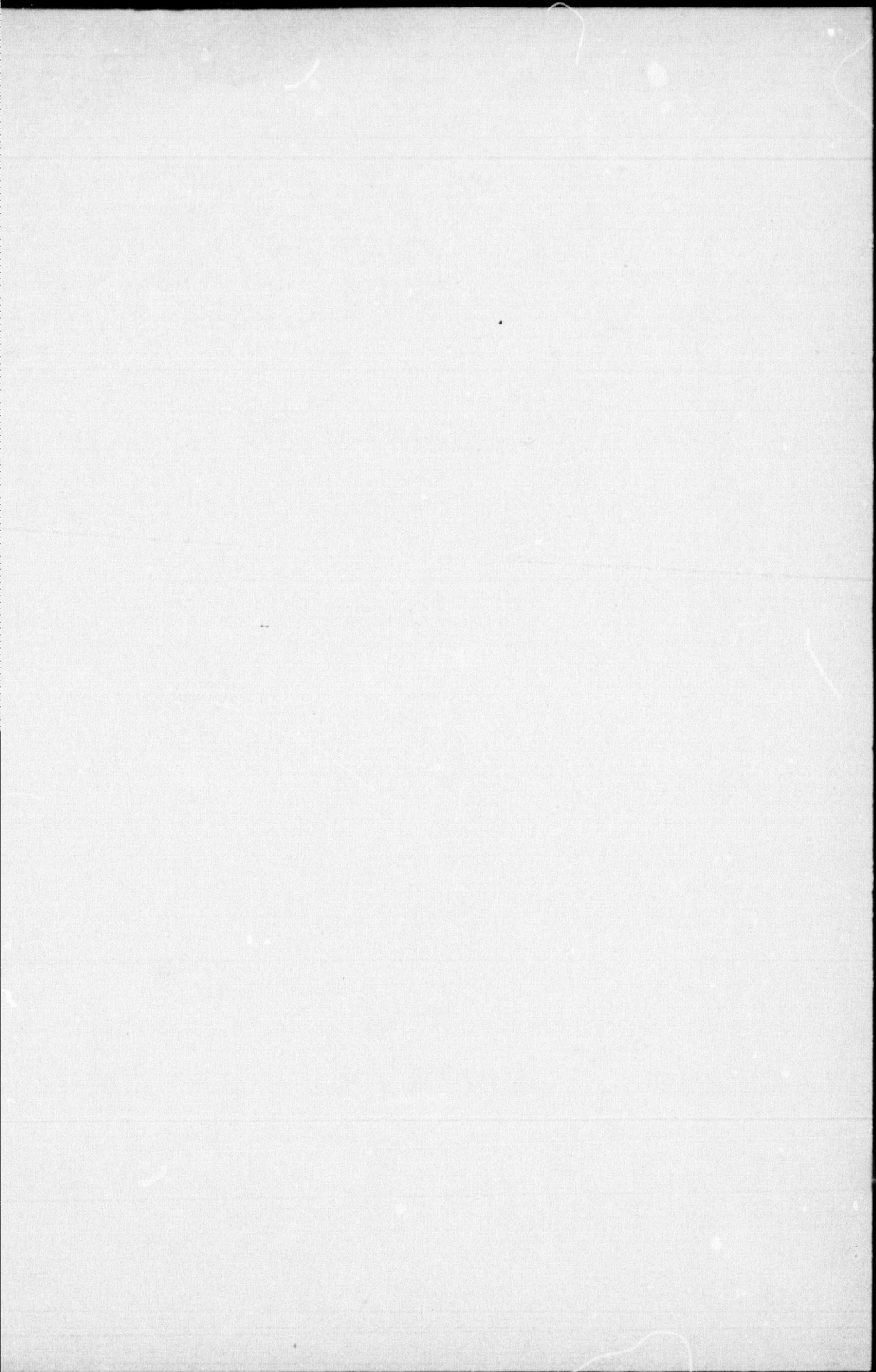

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1017, 77-2055

UNITED STATES OF AMERICA,

Appellee,

—against—

PHILIP FLOYD TOLLIVER,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Philip Floyd Tolliver appeals from a judgment of conviction entered December 20, 1976, after a jury trial with another, in the United States District Court for the Eastern District of New York (Dooling, J.). Appellant was convicted of bank robbery by force or intimidation (Count 1), in violation of 18 United States Code, Sections 2113(a) and 2, and of conspiracy to rob a bank (Count 3), in violation of 18 U.S.C. § 371.[1] Appellant was sen-

[1] Appellant was acquitted on another count (Count 2), charging him with assault and placing lives in jeopardy during the course of the robbery, in violation of 18 U.S.C. §§ 2113(d) and 2.

A co-defendant, Bill Croft, had been charged along with appellant in all three counts of the indictment (76 CR 472). Croft pleaded guilty during the trial (at the close of the Government's case) to the "(d) count" (Count 2), and was sentenced to ten years imprisonment with eligibility for parole pursuant to 18 U.S.C. § 4205(b) (2).

tenced to a term of ten years imprisonment on the robbery count and five years imprisonment on the conspiracy count, such terms to run concurrently with each other and consecutively to a sentence imposed on appellant by the same Court in June, 1967.[2] In the instant sentence, appellant was given parole eligibility pursuant to 18 U.S.C. § 4205(b)(2).

An appeal is also taken from an order of the District Court (Dooling, J.), rendered on April 20, 1977, subsequent to a hearing, denying a petition by appellant pursuant to 28 U.S.C. § 2255, for vacation of the judgment of conviction of December 20, 1977. By order of this Court, the two appeals have been consolidated into the instant appeal.

On this appeal appellant urges reversal of his conviction and vacation of his sentence on various grounds: errors in the trial court's instructions to the jury; incompetence of appellant's court-appointed counsel; denial of constitutional rights by the exclusion of appellant's counsel from a post line-up interview with a key identification witness; and insufficient evidence to sustain the conviction.

Statement of the Case

A. The Government's Case

The evidence disclosed that on July 20, 1976, at approximately 9:15 A.M., two masked and armed black men entered the Marine Midland Tinker National Bank in East Farmingdale, New York and robbed that bank of

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[2] Appellant is presently serving the 1967 sentence (which was imposed on a bank robbery conviction), as a result of his conviction, subsequent to the instant trial, for violation of his parole from that sentence.

over $17,000 in currency (317-20).[3] Witnesses at the bank testified that the robbers made their getaway in a green car bearing New York license plate number 852 MHT (346, 365). James Zima, the Government's key witness, testified that at approximately 9:20 a.m. he was driving on Central Avenue away from the direction of the bank when his car was overtaken by a speeding green Pontiac. Zima saw the Pontiac come to a sudden stop on Central Avenue, at a point away from any buildings and adjacent to a cemetery (421). He then saw two black men quickly exit the Pontiac, and run to and enter a white Cadillac parked a few feet away (407). One of the running men, who was carrying a large paper bag, got into the back seat of the Cadillac. The other man, later identified by Zima as co-defendant Croft, sat in the passenger side of the front of the Cadillac.[4] As Zima passed the Cadillac, he observed the facial features of a third man—later identified by Zima as appellant—who was driving the Cadillac (410). The government's proof also showed that the Cadillac was registered to appellant's wife (585).

Zima, his curiosity aroused, slowed his vehicle, allowing the Cadillac to pass him and turn into another street, again in a direction away from the bank. The Cadillac was followed by Zima until it made another turn, in the direction of a residential neighborhood. Zima, having noted the license plate number of the Cadillac, saw a Suffolk County police car, which had been alerted to the

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[3] Numerical references in parenthesis refer to page numbers of the trial transcript. When preceded by dates, such references refer to a pretrial hearing (August 16, 1976) or the hearing on appellant's motion under 28 U.S.C. § 2255 (April 13, 1977). "App" references are to Appellant's Appendix.

[4] The getaway Pontiac, which had been stolen in Huntington, New York, on July 19, 1976, was found by Suffolk County Police at the precise location where the witness Zima saw the switch to the Cadillac.

area, and immediately reported to the police what he had seen (412-417, 593). A radio message was thereupon broadcast to police units describing the Cadillac and its license number (516-517). A few minutes later, a Suffolk County police officer observed the Cadillac travelling westward on the Southern State Parkway within the vicinity. The officer followed the Cadillac and, at approximately 9:30 a.m., stopped it (532, 534, 535-36). Croft and appellant were found inside (537). The third man was no longer in the car (and has not been apprehended) (4/13/77, 127-28). Also missing was the paper bag and its likely contents (a jacket worn by Croft during the robbery, the masks and guns, and the stolen money) (534-540). Police testimony demonstrated that in view of the time sequences, the locations of the getaway vehicles were well within the normal driving possibilities of the bank robbers (594-95).

Introduced at the trial were written statements obtained by FBI agents from appellant and Croft after their arrests.[5] Appellant and Croft stated, in separate interviews, that they had been driving together that morning in the towns of Wyandanch and Amityville looking for a gambling game and had not been near the bank (550-51, 584). The statements differed only in that appellant stated that he and Croft had visited a particular gambling parlor in Wyandanch, at approximately 9:15 a.m., whereas Croft denied that they had done so (550-51, 583-85). Judge Dooling admitted the statements into evidence, denying a defense request, made prior to the choosing of the jury, that the defendants be severed for trial pursuant to the doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968). Judge Dooling ruled that the statements, which the Government sought to have admitted because of their falsity rather than their truth, were essentially interlocking and thus free of the diffi

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[5] Neither defendant testified.

culties underlying the *Bruton* decision (279-80, 282-83, 285).

B. The Line-up and Subsequent Suppression Hearing

At the suggestion of the trial judge, who invited the Government to test the Zima identifications (8/16/76, pp. 13-15, 18), a pretrial line-up was conducted at the Suffolk County jail. Appellant was displayed to Zima as part of a six man line-up in the presence of appellant's counsel. There was no objection by counsel to the persons chosen to participate or to the way in which the line-up itself was conducted (176-77). Counsel, however, was not permitted to be present where Zima, after being escorted from the line-up room, was asked if he could make an identification. Counsel objected to this refusal to allow her presence at the interview, and this objection became the basis of a motion to suppress Zima's identification of appellant.

The testimony at a suppression hearing on this issue disclosed that after initially observing the line-up, Zima was taken into a separate room and was asked if there was someone in the line-up whom he recognized. Both Zima and FBI Agent Sweeney, who was present during the line-up and Zima's interview, testified at the hearing that there was no mention of which of the persons in the line-up was the defendant or even whether any of the defendants was in the line-up (pp. 173-74, 224, 228, 231-33, 236). Initially, Zima stated that an individual who was not appellant looked to him most like the person he had seen driving the Cadillac; Zima, however, stated that he was uncertain of this identification and would like to see all of the participants while they were wearing sunglasses since the driver of the Cadillac had been wearing sunglasses when Zima had seen him (pp. 263). Thereupon, Zima, who was not told whether he had picked out one of the defendants, was taken back for a second view

of the line-up, in which appellant was again included and at which the participants alternately wore a pair of sunglasses (pp. 228-29). After being escorted again to a separate room, Zima, again not being given any information, identified appellant, stating that the identification was now "beyond a benefit of a doubt" (pp. 180-85, 226-30).

After conducting a full hearing on this issue, Judge Dooling, while expressing general reservations about the procedure that had been employed, found that on the basis of the relevant cases the procedure was not unlawful.[6] Accordingly, the suppression motion was denied (8/16/76, pp. 14-16; 269-71).

C. The Croft Guilty Plea

After the Government rested its case at trial, co-defendant Croft (who was represented by separate counsel) pleaded guilty before Judge Dooling to Count 2 of the indictment, charging him with placing lives in jeopardy during the bank robbery (18 U.S.C. § 2213(d)). See n.1, *supra*. In exchange for his plea of guilty Croft was promised that the Government would move before the Court to dismiss, at the time of sentence, the remaining two counts of the indictment. In addition, Croft was told that the Government would not oppose his continuing

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[6] The suppression hearing also dealt with the propriety of the decision, made by the FBI at the time appellant and Croft were stopped on July 20, 1976, to bring Zima to view them. Judge Dooling found that the identification procedure employed at that time had been proper in view of the need of the FBI to know whether it had captured the correct people. Also covered at the suppression hearing was the question whether the statements of appellant and Croft were taken in conformity with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Appellant has not in this appeal questioned the Court's rulings in favor of the Government on these questions.

to be out of jail, pursuant to the then-existing bail arrangement, until the time of his sentence (621-628).

Subsequent to Croft's guilty plea, appellant's counsel requested that the judge inform the jury that Croft was no longer in the trial because Croft had pleaded guilty (656). There was no objection on this point from the Government and the Court informed the jury that Croft had pleaded guilty to Count 2 of the indictment (656-57, 664).[7] Judge Dooling further instructed the jury that it was to disregard Croft's pretrial statement, which was no longer considered to be evidence in the case (*id*).[8]

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[7] The case against Croft was reinforced by bank photograph evidence. The high-heeled shoes Croft wore at the time of his arrest looked exactly like the shoes of one of the bank robbers as shown in the robbery photographs introduced into evidence (384, 576). In addition, the pants worn by Croft at the time of his arrest corresponded to the color of the pants of one of the robbers as observed by a bank witness (385, 577).

[8] During its deliberations, the jury requested to have read back testimony of the FBI agents on the whereabouts of appellant and Croft prior to 9 a.m. on July 20, 1976. The court allowed the jury to hear the testimony on appellant's statement to the FBI but reminded the jury that Croft's statement was no longer in evidence and could not be considered (721-22).

Later in its deliberations the jury asked whether it was required to return the same verdict on Count 3, charging conspiracy to commit bank robbery, as on Count 1, charging bank robbery through force or intimidation (728). The Court responded (728); "We have your message: 'Does the verdict on Count Three require the same verdict on Count One and Two?' Well, I instructed you that you should consider each count separately and return a separate verdict on each count and that the verdicts on the three counts do not have to be the same.

What you should do is to see if you're satisfied that the Government has, with respect to each count, established the essential elements of that count beyond a reasonable doubt. If you find that the Government has done so, then you will bring in a verdict of guilty on that count. If you find that it has not established each essential element of the count, beyond a reasonable doubt, then you must acquit and that is true as to each count."

D. The 2255 Petition and Subsequent Hearing

Subsequent to the sentencing and incarceration of appellant and Croft, appellant filed a motion with the District Court pursuant to 28 U.S.C. § 2255 for vacation of his sentence because of the alleged incompetence of his Court-appointed counsel in not obtaining Croft's testimony for appellant. In support of his petition, appellant submitted two affidavits signed by the co-defendant Croft well after Croft's sentence and incarceration (App. G). One affidavit alleged that Croft had been told by appellant's attorney and his own counsel that, if Croft pleaded guilty he would "clear Mr. Tolliver of all charges and that [Croft] should stay away from the courtroom" (*id*). In the second affidavit, Croft stated that whereas Croft and another man had robbed the bank, and appellant did pick them up when they left the getaway car, appellant had no knowledge that he was aiding an escape from a bank robbery (*id*). According to the affidavit, Croft had merely asked appellant to be present at the switch location and told him that Croft had to quickly abandon the green car because of a dispute Croft had with the car's owner.

On April 13, 1977, Judge Dooling held a full hearing on the Section 2255 petition and counsel was appointed to represent appellant at the hearing. Both appellant and Croft testified, and reiterated the information contained in the Croft affidavits (4/13/77, pp. 20-44, 90-102). Appellant thereby admitted, for the first time, that Zima's testimony on the "switch" had been accurate. Appellant's trial counsel as well as Croft's attorney testified that, during the trial, there had never been an indication from either defendant that Croft was available to testify in appellant's behalf. Neither did either counsel discourage Croft from testifying or coming to court (4/13/77, pp. 18-20, 137-141). In fact, appellant's trial counsel stated that whereas she would have welcomed Croft's testimony, appellant continued throughout the trial

to insist to her that he was not even at the scene of the switch when the switch occurred (4/13/77, p. 167). Moreover, Agent Sweeney testified that subsequent to the trial Croft had made statements to the FBI which were inconsistent with the affidavits and Croft's testimony at the hearing.[9]

Judge Dooling permitted appellant's counsel at the hearing to question appellant's trial counsel about various aspects of her trial strategy that had not been raised in appellant's motion papers. Appellant's trial counsel explained that she had asked the trial judge to inform the jury of Croft's guilty plea because she believed that the jury had a greater chance of acquitting appellant under those circumstances. She reasoned that the jury might be fully satisfied to see Croft convicted through his own plea, and to acquit appellant—whose role in the crime would perhaps be seen as more minor than Croft's—because of appellant's steadfast assertion of innocence (4/13/77, pp. 165-66). Trial counsel additionally explained that she did not cross-examine Zima on the initial misidentification of appellant during the line-up because testimony on the positive identification that was made after sunglasses were placed on appellant would have been harmful to appellant's case (4/13/77, 73-75).[10]

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[9] Thus, for example, on one occasion, Croft told Agent Sweeney that he could not inform the FBI of the identity of the uncaptured man because of fear Croft had for his life. At a subsequent date, Croft stated to Sweeney that the third man was appellant's friend to whom Croft hade been introduced casually and whose full name Croft did not even know (4/13/77, pp. 125-27). These statements contrasted with Croft's testimony at the hearing that appellant did not know the third man (4/13/77, pp. 51).

[10] Appellant's trial counsel was additionally asked the reason for her decision not to request a mistrial after Croft's guilty plea, in view of the fact that a new jury would not have heard Croft's pretrial statement (4/13/77, 159). That the jury attached some importance to the statement of Croft was proven, it was argued,

[Footnote continued on following page]

The Court, in a memorandum and order dated April 20, 1977 (App. F), denied appellant's petition. Judge Dooling credited the testimony of the two trial attorneys and stated that he did not believe the testimony of appellant or Croft during the hearing (App. F, at 8-9). The Court found that, even if Croft had testified at the trial in appellant's behalf, the verdict would likely have been the same (App. F, at 9). No ground for a declaration of incompetency of counsel was found to have been established (Id. at 7-8). Lastly, the Court found that appellant's difficulties in trial strategy were largely of his own making since he had not been honest with his trial counsel —for example, as in telling her throughout the trial and until the verdict that he was not at the Central Avenue "switch" (App. F, at 4).

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by the jury's request to have the FBI testimony re-read during deliberations (721). See n.8 *supra*. The trial counsel responded by stating that she did not recall her thought processes at the time of the deliberations. We note, however, that in view of the defense at trial—that appellant may very well have been at the scene of the switch but that in any event his conduct was innocent—the possible incriminating value of the statements could reasonably have been regarded as outweighed by the exculpatory force of Croft's plea. Indeed, it is clear that trial counsel wished to hold on to the advantage which she felt existed from the jury's knowledge that Croft had pleaded guilty (165-66). Further, it should be observed that Judge Dooling, in ruling that trial counsel's decision not to ask for a mistrial did not constitute incompetence, noted that the Government's attorney made no mention, in his initial summation or rebuttal summation, of either defendant's post-arrest statement (App. F, at 5).

ARGUMENT

POINT I

The Trial Judge Did Not Err In His Instructions To The Jury.

Appellant assigns as error various aspects of the Court's instructions to the Jury. He argues that the Court's errors consisted of: 1) its failure to warn the jury that Croft's plea was not evidence in the case; 2) its instruction that the Government, in order to establish appellant's guilt, was not required to prove that appellant committed each and every act of the crime; and 3) its failure properly to distinguish for the jury the elements of the crime of conspiracy from the elements of the substantive charge of aiding and abetting a bank robbery.[11] None of these claims has any merit.

A review of the record discloses that the jury was not told that Croft's guilty plea could be regarded as evidence in the case. The Court merely instructed the jury, as defense counsel had requested, that the reason for Croft's severance was his guilty plea on Count 2. No further instructions on this matter were requested, nor did defense counsel (who wanted to emphasize the plea) ever object to any ommissions in the instruction regarding the plea. Moreover, the Court took great care to instruct the jury that it could not convict appellant unless it found, beyond a reasonable doubt, that each and every element of the crimes charged had been proven. The Court also carefully and correctly defined in detail each element of the crimes charged (e.g., 695-696, 698-699,

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[11] Related to this argument is appellant's claim that his conviction on Count 3 was "duplicitous" with his conviction on count 1.

705-708).[12] Nor is there anything in the record to suggest that the Court or trial counsel ever suggested to the jury that Croft's guilty plea somehow satisfied any of the requirements of conviction with respect to appellant. Rather the Court emphasized the need for independent proof upon each element of each count. In short, there is no reversible error in the Court's failure to give an instruction *sua sponte* concerning Croft's plea.

Nor did the court err when it indicated in its instructions to the jury that the Government did not have to show, in order to convict appellant of the substantive charge of aiding and abetting, that appellant had been directly involved in every act of the bank robbery.[13] To suggest that such a charge constitutes error is contrary to the language of 18 U.S.C. 2 as well as decisions from this Court specifically holding that the commission of a "single act" is sufficient to link a defendant to a criminal enterprise if circumstances justify such an inference. *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

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[12] Contrary to appellant's suggestion here (Br. 30-31), the jury was not given the impression that Croft pleaded guilty on the conspiracy count. In fact, the Court specifically told the jury that Croft had pleaded guilty to Count 1 (see p. 7 *supra*).

[13] With respect to the concept of aiding and abetting, the Court stated, *inter alia* (703):

> Now, I must emphasize to you that to be an aider or abettor in the commission of a crime a person must know that he is helping to commit a crime. If a person is unaware that a crime is being perpetrated, and innocently does something which helps the perpetrator of a crime to complete the commission of an offense, he is not a guilty aider or abettor, since he does not have the required knowledge that a crime is being committed.

Further, there is no foundation for appellant's argument that the Court failed properly to instruct the jury on the differences between the legal concept of aiding and abetting and the concept of conspiracy. As noted above, the Court thoroughly covered all of the essential elements of the crimes charged in each count (e.g., 695-696, 698-699, 705-708). The Court's charge (see 703-708) made it clear that conspiracy differed from the concept of aiding and abetting in that conspiracy involves "the additional element of pre-concert and connnivance not necessarily inherent in the mere joint activity common to aiding and abetting," *United States* v. *Peterson*, 524 F.2d 167, 174 (4th Cir. 1975) *cert. denied*, 423 U.S. 1088 (1976).[14] We note that appellant's contentions on the adequacy of the jury instructions in differentiating between the aiding and abetting and conspiracy charges are not entirely consistent with his argument that the two counts on which he was convicted were duplicitous. The Courts have consistently rejected that argument. *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *United States* v. *Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States* v. *Peterson*, *supra*.

It should also be observed that appellant's trial attorney made none of the arguments advanced here on the question of the adequacy of the court's charge, nor did she object to the charge on any of the aforementioned grounds. See *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976). This

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[14] See, *e.g.*, the Court's charge at 705:

> Well, conspiracy is an offense separate from the commission of any offenses that may have been committed pursuant to the conspiracy. A partnership in criminal purposes, is in and of itself pronounced a crime by the statute. A conspiracy is a combination or agreement of two or more persons to accomplish an unlawful purpose by their concerted actions.

Thus, the
use for the
formation
of A conspiracy

decision, we submit, was reasonable since the Court's charges were proper, and appellant's claims here are without merit.

POINT II

Appellant Was Adequately Represented by Counsel.

Appellant argues that he was inadequately represented by counsel at trial and that therefore his conviction violated his Sixth Amendment rights. He argues that this inadequate representation was shown by: 1) her failure to object to the acceptance of Croft's guilty plea and her request that the jury be informed of the plea; 2) her failure to move for a mistrial when the jury asked to be read the testimony on the statements of the defendants as to their whereabouts during the morning of the bank robbery; and 3) her failure to cross-examine Zima about the misidentification Zima tentatively made at appellant's initial line-up. These contentions have no substance.

This Court has repeatedly stated that, in order for a claim of ineffective assistance of counsel to prevail, it must be shown that the representation of the defendant at trial was of such a kind as to "shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *Li-Puma* v. *Commissioner, Department of Corrections, State of New York*, — F.2d —, Docket No. 77-2006, Slip Op. 4657, 4669-4670 (2d Cir. July 11, 1977); *United States* v. *Medico*, 557 F.2d 309, 318 (2d Cir. 1977) (U.S. app. pndg.). See also *Wojtowicz* v. *United States*, 550 F.2d 786, 792 (2d Cir. 1977). Here, trial counsel vigorously presented appellant's defense at trial, and the various tactical decisions which appellant criticizes all fall within the area of reasonable trial strategy, and clearly far short

of meeting the Court's Sixth Amendment tests for incompetence of counsel.

Thus, the decision of appellant's trial counsel to have the jury informed of Croft's plea and her failure to object to the Court's acceptance of the plea was merely an exercise of trial strategy, which cannot be grounds for a showing of inadequacy of counsel. *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331-2 (2d Cir. 1974) and cases cited therein. Further, the trial judge scrupulously instructed the jury that it was to strike Croft's statement from its memory since Croft was "no longer a party to this trial" (664).[15] Nor was it error for counsel not to move for a mistrial at the time of the jury note. Counsel had long since elected to defend the case on the theory that appellant may very well have been present at the time of the car switching but had no knowledge of the robbery. In view of this defense, which probably had as great a chance to succeed as any other, it was reasonable for defense counsel to conclude that the statements by appellant or Croft were unimportant. And in light of the

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[15] On this point, the Court stated (see 664, 773):

The evidence as to that statement was evidence admissible only against Mr. Croft and must now be, and is stricken from the record and you must erase it altogether from your minds. Nothing that was said in that confession will be regarded by you as truthful or false. It cannot be taken into account in evaluating the case on all of the evidence against the defendant Tolliver . . .

Now, what Mr. Croft told Mr. Sooker has been stricken from the record. You remember, I asked you to dismiss it from your minds because that just bound him, in lawyers' language, and he's out of the case now. That wasn't evidence against Mr. Tolliver to any degree.

Appellant has additionally argued that the Court erred in accepting Croft's guilty plea at the stage of the trial when the plea occurred. This argument is without foundation since it is well established that the decision to accept an offered plea of guilty is within the broad discretion of the trial judge. *United States* v. *Navedo*, 516 F.2d 293 (2d Cir. 1975).

defense's trial strategy, appellant's chance of an acquittal seemed greater with a jury that had seen Croft on trial and then learned of his guilty plea rather than with a retrial, where the jury would likely have known nothing about the disposition of Croft's case.[16]

Lastly, we submit that counsel did not err in determining not to probe into the initial uncertainty of the line-up identification of appellant by Zima. Knowledge by the jury that Zima had been able to make an absolutely positive identification of appellant from a line-up in which the persons viewed were wearing sunglasses could only have assisted the Government's case.

Judge Dooling, who saw and heard the witnesses at trial and at the post trial hearing, *United States* v. *Medico*, *supra* at 313, determined that appellant had not been inadequately represented by counsel. We submit that a thorough review of the record supports the ruling of the trial judge on appellant's Section 2255 motion and will show that the conduct of the defense by appellant's trial counsel more than met the standards for judging competency set out by this Court. *United States* v. *Wight*, *supra*, 176 F.2d at 379; see also *Rickenbacker* v. *Warden, Auburn Correctional Facility*, 550 F.2d 62 (2d Cir. 1976) (*reh. en banc. denied* 1977) (U.S. app. pndg.).

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[16] Surely, the denial of a motion for mistrial on the ground asserted here would not have constituted reversible error.

POINT III

The Line-up Was Conducted In Conformity With Appellant's Constitutional Right To The Assistance Of Counsel; Further Zima's Identification Of Appellant At Trial Was Proven To Have A Sufficient Basis Independent Of The Line-up So As To Permit Its Introduction Into Evidence.

Appellant argues, as he did in the District Court, that the exclusion of his trial counsel from the interview with Zima following the line-up constituted denial of effective assistance of counsel at a critical stage in the proceedings, and that the Zima identification should have therefore been suppressed. See *Powell* v. *Alabama*, 287 U.S. 45 (1932); *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Ash*, 413 U.S. 300 (1973). In support of this contention, appellant argues that he should have been allowed to have his trial counsel present at the interview with Zima to allay the possibility of suggestive communications to Zima on the part of the Government.

Appellant's argument runs contrary to decisions from three Circuit Courts of Appeals, which specifically hold that the presence of counsel is not required at the post line-up interview of an identification witness. *United States* v. *Wilcox*, 507 F.2d 364 (4th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); *United States* v. *Banks*, 485 F.2d 545 (5th Cir.), *cert. denied*, 416 U.S. 987 (1973); *Doss* v. *United States*, 431 F.2d 601 (9th Cir. 1970). The Ninth Circuit, this year, has announced its adherence to its *Doss* decision, *supra*, in a case in which the identification witness was expressly instructed not to speak with defense counsel any time during the day of the line-up. *United States* v. *Parker*, 549 F.2d 1217 (9th Cir.), *cert. denied*, 97 S.Ct. 1659 (1977). Similarly, this Circuit has observed that "to require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present

would press the Sixth Amendment beyond any previous boundary." *United States* v. *Bennett*, 409 F.2d 888, 899 (2d Cir. 1969).

In the instant case, there was no claim that the line-up was conducted in a suggestive manner. The trial judge was shown photographs of the line-ups during the suppression hearing (17-78, 182-83). Further, defense counsel were given full opportunity at the hearing to probe into the events of the post line-up interview when they examined the F.B.I. agent involved and Zima on the witness stand. There was no evidence adduced that suggestive communication or procedures were used. Accordingly, in view of the precedent cited above, appellant's argument should be rejected.

Further, we submit that regardless of the legality of the line-up procedures used in the instant case, the identification of appellant by Zima was properly admitted into evidence because the identification had a basis independent of the lineup. The Supreme Court and this Court have both held that even where a witness has identified a defendant through a "show up" or through viewing a photo of a defendant, even when the photo was shown alone and not made part of a spread, an in-court identification of the defendant by the witness is permitted as long as the witness had a strong independent recollection of the defendant from viewing the defendant at the time of the crime. *Neil* v. *Biggers*, 409 U.S. 188, 198-201 (1972); *United States* v. *Boston*, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States ex rel. Gonzales* v. *Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973).

In the instant case, there can be no question of the independent basis of the Zima identification. Zima testified that he took great care to observe the persons in the front seat of the Cadillac during the switch (410). He also testified that he remembered the face of appel-

lant from the time of the crime rather than from later identification procedures (259).[17] Hence, there is a second strong rationale supporting the Zima in-court identification.

POINT IV

The Trial Judge Properly Denied Appellant's Motion For A Judgment Of Acquittal.

Appellant argues that the denial by the trial judge of his motion for a judgment of acquittal was erroneous. He asserts that the evidence against him was insufficient to link him to the substantive charges or to the conspiracy. Appellant characterizes the case against him as one involving "mere association with persons engaged in a criminal enterprise . . . [and] presence at the scene of their crime. . ." *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

We submit that, viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), the evidence was adequate to support the jury's verdict. The evidence showed that appellant, who looked back to view the "switch", picked up the two bank robbers at exactly the time they were escaping from the bank. The robbers ran to appellant's car, which was parked adjacent to a cemetery at approximately 9:20 A.M. Thereafter, the car proceeded away from the direction of the bank and the man with the guns and the loot was let out.[18]

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[17] Appellant makes his contention here from a somewhat unusual posture since, at the post-trial hearing, he corroborated the accuracy of Zima's identification by admitting that he was indeed where Zima saw him at the time of the "switch".

[18] Appellant's false statement about his whereabouts at the time Zima had seen him was additional evidence of appellant's consciousness of guilt. However, as we have observed, the importance of this statement at the trial was largely negated by the strategy adopted by appellant's trial counsel.

Based on this evidence, the motion for judgment of acquittal was properly denied. There is no requirement that a defendant's [illegible] to an enterprise be established by direct evidence. [illegible] participation in the enterprise may certainly be proven t[illegible]ough circumstantial evidence. *United States* v. *Manfred[illegible]*, 488 F.2d 588 (2d Cir. 1973), *cert. denied* 417 U.S. 936 (1974); *United States* v *Cassino*, 467 F.2d 610, 618 n.21 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). Further, no particular quantum of evidence is necessary to prove the connection between the criminal enterprise and a particular defendant. The Courts have repeatedly held under some circumstances that proof of the commission of a "single act" is sufficient, if those circumstances justify an inference that there was knowledge of a broader criminal activity. *United States* v. *D'Amato*, 493 F.2d 359, 365 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

We submit that appellant's acts played a substantial role in the bank robbery here. They were not isolated in time and place from the central events of the crime. Neither were his acts committed independently of the two other persons involved in the conspiracy, which involved a single brief event. See *United States* v. *Torres*, 503 F. 2d 1120, 1123-4 (2d Cir. 1974). Appellant's conduct was a necessary component of the planned bank robbery, if it was to be successful.

Finally, we submit that this Court's recent decision in *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976), is controlling. The evidence against *Mariani* was briefly stated by this Court (539 F.2d at 919-920):

> A surveillance team . . . saw Mariani and Acevedo enter the cab . . . Acevedo sat in the rear while Mariani drove. Mariani drove past the bank once and then returned and double parked, keeping the motor running. Acevedo, carrying a manila

> envelope, twice glanced back at the cab before entering the bank. After two to five minutes, Mariani sped off, engaging in extraordinary traffic maneuvers before he abandoned the cab. His car was found parked on the very block where he was first seen entering the cab.

This Court held that the evidence was not "insufficient to support the jury verdict as a matter of law." The Court further stated that "Mariani's actions during the surveillance period could support an inference by the jury that he was to be the getaway driver for the robbery." 539 F.2d at 920.

As in *Mariani*, there was strong circumstancial evidence linking appellant to the bank robbery. Like Mariani, appellant was, at a critical time, in the vicinity of the bank and assisting perpetrators of the crime, who were still carrying weapons and loot. Thus, the jury's verdict was amply supported by the evidence adduced at trial.

CONCLUSION

The judgment of conviction (as well as the order denying relief under 28 U.S.C. 2255) should be affirmed.

Respectfully submitted,

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Eastern District of New York.

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* We wish to acknowledge the assistance, in preparation of this brief, of Guy A. Novak and Charles A. Damato, law student assistants at the United States Attorney's Office, Eastern District of New York.

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DOLORES M. BYRD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of October 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

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Dolores M Byrd

Sworn to before me this

20th day of October 19 77

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979